

No. 82-1394

Office-Supreme Court, U.S.

FILED

MAR 18 1983

RENEE L. STEVENS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CENTRAL FLORIDA ENTERPRISES, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF FOR RESPONDENTS
COWLES BROADCASTING, INC. AND
COWLES COMMUNICATIONS, INC.
IN OPPOSITION**

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This case arises from a comparative renewal hearing conducted by the Federal Communications Commission ("F.C.C."). Respondent Cowles Broadcasting, Inc. ("CBI") applied for renewal of license for WESH-TV, Channel 2, Daytona Beach, Florida.¹ Petitioner Central

¹ Respondent Cowles Communications, Inc. ("CCI") is the former parent company of CBI. CCI is currently in liquidation.

Florida Enterprises, Inc. ("Central") applied for a construction permit for a new television station on the same channel. After remand from the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals"),² the F.C.C. concluded that the public interest, convenience and necessity would better be served by granting CBI's application for renewal of license for WESH-TV, and thus it denied Central's application.³ Upon appeal by Central, the same panel of the Court of Appeals, which had previously vacated F.C.C. orders granting the WESH-TV renewal application, now affirmed the F.C.C.'s Decision and denied Central's request for rehearing.⁴

Central contends that this has chilled or nullified the filing of competing applications against the renewal of TV licenses. However, Central is wrong. On November 1, 1982, for example, after the Court of Appeals had denied rehearing in this case, competing applications were filed against the renewal of two Chicago, Illinois commercial TV stations.⁵

Central has ignored this Court's opinion in *Federal Communications Commission v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978).⁶ Therein

² Pet. App. A-269-A-315. The Court of Appeals had vacated and remanded prior F.C.C. orders. Pet. App. A-108-A-268.

³ Pet. App. A-17-A-62.

⁴ Pet. App. A-1-A-17.

⁵ Telecasting, Inc. filed an application (BPCT-821101KF) mutually exclusive with the application for renewal of license for WCIU-TV, Chicago. Monroe Communications, Inc. filed an application (BPCT-821101KH) mutually exclusive with the application for renewal of license for WSNS-TV, Chicago.

⁶ At the same time Central burdens its petition with irrelevancies (pp. 11-12, 16-17) that have no bearing on the questions it has
[footnote continued]

this Court recognized the important differences between initial licensing and renewal licensing proceedings:

[T]he Commission has consistently acted on the theory that preserving continuity of meritorious service furthers the public interest, both in its direct consequence of bringing proven broadcast service to the public, and in its indirect consequence of rewarding—and avoiding losses to—licensees who have invested the money and effort necessary to produce quality performance. Thus . . . both the Commission and the courts have recognized that a licensee who has given meritorious service has a “legitimate renewal expectanc[y]” that is “implicit in the structure of the Act” and should not be destroyed absent good cause.

Id., 436 U.S. at 805 (footnote and citations omitted). The Court added that “Congress appears to have lent its approval to the Commission’s policy of evaluating licensees on a somewhat different basis from new applicants.” *Id.*, 436 U.S. at 810-11 (footnote omitted).

The F.C.C. repeatedly stressed that the record in this proceeding is devoid of any complaints about how WESH-TV had been run during the license period in question and concluded that the WESH-TV broadcast record was meritorious.⁷ Central did not even attempt to introduce evidence critical of the WESH-TV past broadcast record.

The only issue concerning WESH-TV upon which Central has relied is that involving the existence of

presented, much less on the comparative hearing process. Central also ignores the fact that its basic qualifications are in question before the F.C.C. and that its application could not be granted without further hearings.

⁷ Pet. App. A-37; A-195 - A-196.

dual studios, just outside Daytona Beach and Orlando, Florida. However, the F.C.C. found there was only a technical violation of its main studio rule, because CBI did not actually move a studio away from Daytona Beach. CBI believes no violation ever occurred, but nonetheless adopted procedures to insure full compliance with not only the main studio rule applicable during the license period but also the new rules adopted thereafter.

The F.C.C. found that the purpose of its main studio rule, to insure an accessible outlet to the community of license for local expression,⁸ had been fully satisfied,⁹ because there was no derogation of service to Daytona Beach. The Court of Appeals held that the F.C.C. (which does have the expertise in interpreting its own Rules) had

⁸ Pet. App. A-35; A-154.

⁹ CBI and CCI traced for the Court of Appeals, in their Intervenor's Brief, the history and development of the F.C.C.'s main studio rules. Consistently, the F.C.C. has been concerned with accessibility and local service obligations. *Promulgation of Rules and Regulations Concerning the Origination Point of Standard and FM Broadcast Stations* (Docket No. 8747), 43 F.C.C. 570, 571, 1 Rad. Reg. 91:465, 91:466 (1950); *Sixth Report and Order*, 41 F.C.C. 148, 1 Rad. Reg. 91:599 (1952), *recon. den. sub nom. WSIX Broadcasting Station*, 43 F.C.C. 888, 890, 8 Rad. Reg. 216, 218 (1952); *Nationwide Communications, Inc.*, 18 F.C.C.2d 171, 172, 16 Rad. Reg. 2d 544, 546 (1969); *Amendments of Parts 1 and 73 of the Commission's Rules and Regulations Pertaining to the Main Studio Location of FM and Television Broadcast Stations*, 27 F.C.C.2d 851, 852, 21 Rad. Reg. 2d 1501, 1502 (1971), and *Arizona Communications Corp.*, 27 F.C.C.2d 283, 284, 20 Rad. Reg. 2d 1270, 1272 (1971). Most recently, the F.C.C. has said that "the ultimate decision as to whether a station is adequately serving its community of license is based on the licensee's programming for that community, not the location of its studios." *Meredith Corporation*, 65 F.C.C.2d 182, 185, 40 Rad. Reg. 2d 1743, 1747 (1977), *aff'd without opinion sub nom. National Welfare Rights Organization v. F.C.C.*, 191 U.S. App. D.C. 213, 589 F.2d 1116 (1978).

followed the court's directives and acted properly in its handling of this issue.¹⁰

As to the so-called "mail fraud" issue, upon remand the Commission fully reexamined the record in light of the questions raised by the Court of Appeals. It once again cited the testimony of the U.S. Attorney in charge of the investigation that he had no criminal case against either CCI or its personnel and again stressed the significant point that the broadcast facilities of WESH-TV were not used to promote mail fraud. The F.C.C. concluded that the record was complete, that no further hearings were required, and that neither disqualification nor a comparative demerit were warranted.¹¹ The Court of Appeals, obviously satisfied with the F.C.C.'s handling of the issues that concerned the court, held that the F.C.C.'s findings were adequately supported and that it could not find fault with the F.C.C.'s actions.¹²

The F.C.C.'s statutory mandate, under Section 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(a), was to determine whether a grant of CBI's application for renewal of license for WESH-TV would better serve the "public interest, convenience and necessity,"¹³ than a grant of Central's application.

¹⁰ Pet. App. A-5; A-7 - A-8 n.16.

¹¹ Pet. App. A-29 - A-30.

¹² Pet. App. A-5 and A-11 n.29.

¹³ Respondent NBMC's suggested standard of "best practicable service" is not set forth in Section 309. Rather, that term comes from the F.C.C.'s *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965), which is used to decide only initial licensing proceedings. "Best practicable service" is one of two prongs, along with diversification of control of the mass media, under that inquiry.

Balancing all the public interest considerations, the F.C.C. concluded, and the Court of Appeals agreed, that CBI warranted a "renewal expectancy" and that the F.C.C.'s statutory mandate was fulfilled by granting the WESH-TV renewal with its proven meritorious performance and denying Central's application containing meager untried promises.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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